K C Mehta & Co.

Chartered Accountants

kcm Insight

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Dear Reader,

We are happy to present kcmInsight, comprising of important legislative changes in direct & indirect tax laws, corporate & other regulatory laws, as well as recent important decisions on direct & indirect taxes.

We hope that we are able to provide you an insight on various updates and that you will find the same informative and useful.

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For detailed understanding or more information, send your queries to kcminsight@kcmehta.com

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Recent deal activity in the Food-Tech space

Background

Food tech sector which was flourishing at the beginning of this year saw a slowdown amidst nationwide lockdown due to Covid-19 pandemic. During this period, delivery volumes across platforms declined to c. 20-30% of pre-Covid levels as the lockdown led to disruption at more than 90% of the restaurants listed on food delivery platforms. However, the sector has started witnessing recovery in revenues from Jun-20 after easing of the curbs.

M&A activity

In the beginning of the year, Alibaba's Ant Financial-backed online food delivery giant Zomato acquired Indian operations of Uber Eats for around Rs 2,485 crore ($ 350 million) in an all stock deal thereby giving Uber a 9.99% ownership in Zomato. As per the deal, Uber Eats in India shall discontinue its operations and direct the restaurants, delivery partners, and users of the Uber Eats application to the Zomato platform. This deal was announced post IPO by Uber whereby it planned to cut-off the loss-making segments of the company globally.

Uber Eats, the food delivery business of ride hailing company Uber, came to India in 2017. Uber Eats in India had about 26,000 restaurant partners and garnered about 12% market share. Though Uber was at its peak in the ride hailing business, it could not survive the tough competition against food tech giants such as Zomato and Swiggy in India. This deal allowed Zomato to take more than 50-55% of the market share putting it ahead of its rival Swiggy.

Having said that, Swiggy has made 4 acquisitions since its inception. The most recent one being that of Bangalore based AI startup Kint.io in 2019. Kint.io primarily develops AI which utilizes deep learning and computer vision to identify objects in video clips. Swiggy has claimed that it will use this technical knowhow to enhance the customer experience and the acquisition was labelled as an acquihire.

It is interesting to note that both Swiggy and Zomato have chosen the inorganic way of growth by investing in companies which allow them to expand and enhance their logistical spread.

Fund Raising

Just before the Uber Eats acquisition was announced, Zomato had raised about $ 150 million from China's Ant Financial at a valuation of around $ 3 billion. However, Zomato struggled to receive $ 100 million of the fund raise due to the anti-China chorus and revised FDI norms amid border tensions.

In Mar-20, Zomato raised $ 5 million from Pacific Horizon Investment Trust managed by the UK-based investment management firm Baillie Gifford & Co., valuing Zomato at a post-money valuation of $ 3.25 billion. In Aug-20, Zomato raised $ 160 million ($ 60 million from Temasek and $ 100 million from Tiger Global) at the same valuation as at Mar-20 round.

In Nov-20, Zomato raised $ 195 million from six investors including Luxor, Kora and Steadview, valuing Zomato at $ 3.6 billion. Of the $ 195 million, $ 60 million was raised from Luxor Capital, $ 50 million from Kora Management, Mirae Asset invested $ 40 million, while Steadview Capital and Bow Wave Capital each invested $ 20 million, and $ 5 million come from

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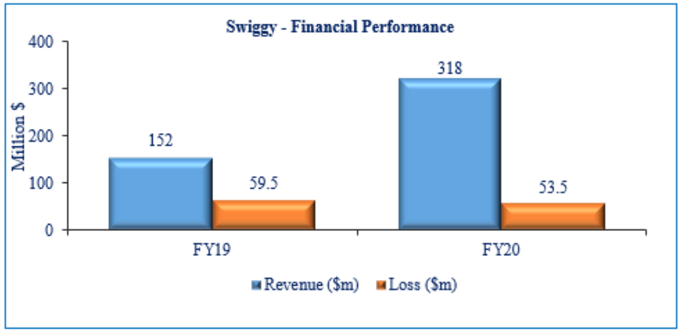
Baillie Gifford & Co. The rise in Zomato's valuation augurs well for its planned IPO in 2021.

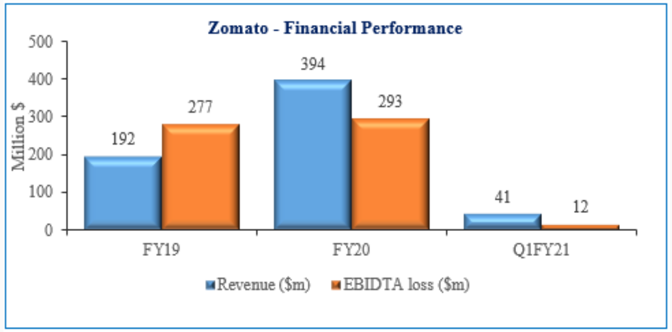
Swiggy on the other hand, raised $ 113 million in Feb-20 from existing investors led by Prosus with participation of other investors. In Apr-20, it raised additional $ 43 million as part of its ongoing round valuing the entity at a post-money valuation of $ 3.6 billion taking the total size of the funding round to $ 156 million. Along with existing investor Tencent, new investors Ark Impact, Korea Investment Partners, Samsung Ventures and Mirae Asset Capital Markets also participated in this round.

Apparent duopoly in India's food delivery sector

Though the food tech industry has many small local players, significant market share rests with Zomato and Swiggy, who are in intense competition. This battle of supremacy between Swiggy and Zomato was one of the primary reasons for the acquisition of Uber Eats by Zomato, which saw itself as another upcoming force in the market. With the exit of Uber Eats, the food tech market consolidated to the two market leaders. It is worthwhile to note that while there is an apparent duopoly in this space, both the market leaders are still burning cash while offering deep discounts to customers.



Source: Business Insider



Source: Zomato; official website

While both the players more than doubled the revenue in FY20 as compared to FY19, Zomato burnt much more cash than Swiggy during the same period. However, Zomato controlled the burn rate in Q1FY21 largely owing to the lockdown. While the revenue growth was led by higher commissions from restaurants and delivery charges from customers, road to profitability could not be reached due to ever increasing logistics and customer acquisition costs.

Way forward

A fast-moving world suddenly paused during the lockdown whereby consumers were forced to cook food at home, which demanded a change in business model by online food delivery players in order to survive. The food tech giants shifted towards quick commerce by delivering groceries at the doorstep. This segment however has more competition with players like JioMart, BigBasket and Grofers having already established their hold. Further, grocery business has lower margins and

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timely delivery becomes inevitable. Zomato exited the grocery delivery business within months of getting into it.

In order to diversify operations, Swiggy has adopted a multi-prong approach by making investments in various segments including hyperlocal deliveries (Swiggy genie) and grocery (Swiggy stores), dairy service (Supr Daily) and has even partnered with ICICI Bank to offer a digital payments wallet (Swiggy money). On the other hand, restaurants are now trying their hands on servicing online orders directly to keep delivery firms at bay by building new technology partnerships. The changing dynamics in the food-tech space suggests that surviving on a standalone food delivery business will be tough going forward.

Income Tax Relief for Developers, Homebuyers

Press Release dated 13 November 2020

In order to encourage Real Estate Industry and boost demand the CBDT has increased the existing Safe harbour limit u/s 43CA of 10% to 20% provided the sale value of residential unit is upto Rs.2 crores. This is applicable in respect of transactions undertaken between November 12, 2020 to June 30, 2021. This limit of 20% shall mutatis -mutandis apply to section 56(2)(x) of the ITA for purchaser perspective. This limit is with reference to difference between the actual sales transaction value and value adopted by stamp duty authority for registration purpose.

CBDT Condones Delay in filing of Audit Report Form 10BB for Section 10(23C) Institutions from AY 2016-17

Circular No. 19 of 2020 dated 03 November 2020

To claim exemption u/s 10(23C), the eligible entities are required to get their accounts audited by an accountant in Form 10BB. In pursuant to representations received form stakeholders, the CBDT vide this circular issued under section 119(2)(b) has condoned the delay in filing of the audit report in Form 10BB for AY 2016-17 as under;

For years prior to AY 2018-19	CITs shall satisfy themselves that the applicant was prevented by reasonable cause from filing the application within the stipulated time. Further, all such applications shall be disposed of by 31.03.2021.
From AY 2018-19 and onwards	Where the delay is for a period of up to 365 days, CITs are authorized to admit such belated applications of condonation of delay under section 119(2) and decide on merits.

CBDT specifies Abu Dhabi based fund as a 'specified person' for purpose of availing exemption u/s 10(23FE) of IT Act

Notification No. 89 of 2020 dated 02 November 2020

Section 10(23FE) of the IT Act, as inserted by the FA, 2020, provides for an exemption to the specified income of the specified person including notified Sovereign Wealth Fund (SWF) & Pension Funds (PF) from investment in specified infrastructure sectors. CBDT has notified the sovereign wealth fund, MIC Redwood 1 RSC Limited, Abu Dhabi, United Arab Emirates ('the fund'), as the specified person for the purpose of section 10 (23FE).

The eligible fund shall be required to comply with the conditions like filing of Return of income, furnishing of Audit report & quarterly statements in respect of each investment within prescribed time limit, made by it, maintaining segmented accounts of income and expenditure in respect of such investment which qualifies for exemption under section 10(23FE) etc.

Circulars & Notifications

Validation of Unique Document Identification Number (UDIN) (Press Release dated 26th November 2020)

As per the norms of ICAI, every CA in practice shall be mandatorily requires to generation and quote UDIN on the Tax Audit Report and Certificates attested by him in accordance with the guideline laid down by ICAI. To discourage practice of uploading/generating fake UDIN by Non- CAs, the CBDT shall validate the UDIN in the e-filing portal online with ICAI. Failure to update UDIN within 15 days of submission of audit report / certificate shall be considered as invalid.

CBDT Guideline TDS on Salary for the FY 220-21

Vide circular No.20/2020 dated December 3, 2020, the CBDT has issued guideline for determining the taxable salary and amount of TDS deductible on salary u/s 192 for the FY 2020-21.

Case Laws

Successor is eligible to claim set-off of unabsorbed deprecation of erstwhile business

Sh. Yerram Venkata Subba Reddy, ITA No. 1119 of 2018, ITAT Hyderabad

The Taxpayer along with other 5 persons jointly formed partnership firm. During the year in question, all the partners jointly executed "Deed of Retirement and Dissolution and conversion into Proprietary concern" and in pursuant to it, the Taxpayer has taken over the business of the firm as proprietor. The rest of the partners have decided to retire and agreed to receive the capital balance in the firm without any distributions of assets of the firm. The Taxpayer filed his individual ITR and claimed set – off of brought forward unabsorbed depreciation of the erstwhile partnership firm. The claim of the Taxpayer was also allowed by the AO while framing the assessment u/s 143(3).

The PCIT then exercised his power u/s 263 of the ITA and revised the assessment, inter alia on the ground that set-off of unabsorbed depreciation of erstwhile partnership firm claimed by the Taxpayer is not in accordance with the law and therefore, to that extent the order passed by the AO is erroneous.

The department has taken an objection that under the ITA there is no enabling provision for allowing set-off of carry forward of business losses/unabsorbed deprecation of partnership firm. In terms of section 10(2A), income of the partnership firm is exempt in the hands of partner and conversely share of loss is also exempt from tax. Lastly, in terms of section 78(1), it is clearly provided that in case of change in constitution of firm, set off of losses is not allowable in the hands of firm and therefore, successor is not eligible to claim it.

The Taxpayer primarily contended that once the business is succeeded, unabsorbed depreciation of the business becomes the depreciation of current year and thus, set-off is within the framework of section 32 read with section 170. Unabsorbed depreciation is governed by section 32 (2) of the ITA and therefore, prohibitions to carry forward and set off loss u/s 78(1) is not applicable.

After considering the facts and legal position, the ITAT held that retirement of all the partners

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Coverage

except one invariably results into dissolution of the partnership firm. If the business of the erstwhile partnership firm has been succeeded by any single partner and he continues the business as proprietary concern, inherently there is change in ownership and thus section 170 would become applicable. By virtue of section 32(2), the unabsorbed depreciation becomes the depreciation of the current year of business and thus, the successor of business is eligible for set off against his total income. Lastly, the scheme of section 78 only prohibits set-off of brought forward business losses and therefore it does not apply to unabsorbed depreciation claim.

Section 56(2)(viib) is applicable in the year of "de facto transfer" of an of immovable property.

ITO v. Rakhi Agrawal, ITA No.94 of 2018 dated October 27,2020, Jabalpur ITAT

Provision of section 56(2)(vii) have been introduced as a counter evasion mechanism to prevent laundering of unaccounted income. Over the period, the provisions have also been widened to cover all the transaction in capital assets which are transacted either without consideration or for inadequate consideration. The Income Tax law recognises the doctrine of "De facto Ownership" and thus, implying that it is not de jure ownership but de facto ownership that should be considered. In case of taxable event, the deeming fiction of section 56(2) and transfer u/s 45 can co-exist and therefore, the doctrine of "De facto Ownership" will also apply with same force u/s 56(2).

The Taxpayer along with other co-owners vide sale deed dated 30.3.2013 (AY 2013-14) purchased a piece of land for certain consideration. The sale deed was however registered with sub-registrar on 24.04.2013 i.e., in AY 2014-15. The department observed that as per the records, the stamp duty value of the land was sustainably higher than the document value and hence he invoked provision of section 56(2)(viib) in AY 2014-15.

It was argued by the department that the title or ownership in an immovable property could not be conveyed by any unregistered document as it is also not valid document enforceable in the eyes of law. The sale consideration has accordingly been assessed in the hands of seller in AY 14-15 being the year in which sale deed was registered.

The Taxpayer argued that the transfer took place on the date of execution of conveyance deed, in AY 2013-14. With respect to section 56(2) it was argued that the deeming fiction of 56(2) to tax lesser consideration has been amended with effect from AY 2014-15 and prior to such amendment there was no enabling provision to tax lesser consideration u/s 56(2)(viib).

The ITAT noted the provisions of section 2(47) of the ITA via a vis section 53A of the Transfer of Property Act & held that the object of the Act is to tax in the hands of person who is in effective control over the property who is regarded as "de facto owner" of the property. The Taxpayer becomes a "*de facto*" owner of the property upon execution of the sale deed and becomes "legal owner" on the date of registration. Thus, there is "receipt" of the subject land on the date of execution of the deed. The ITAT accordingly deleted the addition. The ITAT further held that prior to AY 2014-15, there was no provision to tax shorter consideration u/s 56(2) and accordingly, even otherwise the difference cannot be taxed in AY 2013-14.

It is a settled legal position that transfer can precede sale. In this case since there was an agreement to transfer the property and conditions of section 53A of the Transfer of Property Act were fulfilled there was no reason to shift the year of taxation of capital gains to AY 2014-15.

Penalty cannot be levied on additional income offered to tax in return of income u/s.148

Armoury International vs ACIT, ITA No 3299 of 2017, Mumbai ITAT

Whether penalty is leviable on additional income offered is subject matter of debate and time and again several judicial authorities including the highest authority has taken a view that if the Taxpayer has revised the return showing higher income to buy peace and avoid litigation only then under such bona fide circumstances the authority can exercise the discretion not to levy penalty.

The department received information about bogus purchases form Sales Tax department and based on that information, the case of the Taxpayer the case was reopened u/s 148 of the ITA. In response to said notice, the Taxpayer filed ITR u/s148 and offered the bogus purchases to tax. The Department passed an assessment order and assessed the returned income declared by the Taxpayer and levied penalty u/s 271(1)(c) on the additional income offered in ITR.

The department contended that penalty u/s 271(1)(c) is leviable on additional income disclosed pursuant to notice u/s 148 of the ITA. The Taxpayer on the other hand contended that as there is no difference between the assessed income and the returned income, penalty is not leviable.

The ITAT has thus has an occasion to decide whether penalty order u/s 271(1)(c) is maintainable on additional income disclosed in ITR filed in response to notice issued u/s 148 of the ITA or not. ITAT while adjudicating the issue categorically observed that the penalty is levied on "tax sought to be evaded" which is basically a difference of returned income and assessed income. In case there is no variation, technically the machinery provision for levy of penalty u/s 271(1)(c) fails automatically. The ITAT further relied upon the decision of Delhi HC in the case of SAS Pharmaceutical (UTA No.1058 of 2009) and reiterated that the question "whether there is concealment of inaccurate particulars" must be decided with reference to returned income only. Following the said principles, the ITAT deleted the penalty on additional income disclosed in ITR filed u/s 148.

It is important to note that from AY 2017-18, the provision of section 271(1)(c) is not applicable, and penalty is governed by newly inserted section 270A. In terms of section 270A penalty is leviable in case of "under reporting of Income" or "mis reporting of income". The provision of section 270A, among the other circumstances, it is categorically provided that a person shall considered to have under reported his income if the income reassessed is greater than the income assessed or reassessed before such reassessment. Caution needs to be exercised while applying this decision to the new provisions of section 270A.

Case Laws

Coverage

Exchange fluctuation on repatriation of sale proceeds from sale of foreign investment at purchase value is not chargeable to capital gain tax

Havells India Ltd. VS ACIT in ITA No. 4695 of 2012 dated November 10, 2020

The Taxpayer had made an investment in one of its foreign subsidiary Havells Holdings Limited (HHL). During the AY 2008-09, out of total investment, part of the investment has been redeemed at par value. The exchange difference arising on account of repatriations of funds to India has been recognised as gain on sale of investment in the book of account. The Taxpayer however treated such gain on account of exchange rate fluctuation as capital receipt and did not offer it to tax.

The Department treated the exchange gain arising on repatriation of sale proceeds into India on account of redemption of shares as capital gains taxable u/s 45. The Department contended that the investment into subsidiary had been made out of commercial expediency to increase the market share both in production and customer base and therefore, any gain or income incidental to such investment is taxable u/s 45.

As per the Taxpayer, the exchange gain has arisen not on account of increase in the value of shares but on account of exchange fluctuation only. The Taxpayer referred to the provision of section 45 and Rule 115 of the IT Rules and contended that the capital gain from sale of foreign investment is required to be computed in foreign currency and net gain is then required to be translated into INR at prevailing rate. The original investment was made in Euro currency and redemption also took place in same currency and therefore, in terms of section 45, capital gain is not arising in this transaction.

The ITAT after considering the facts and legal position held that transfer of share and repatriation of funds to India are separate events and exchange gain arising on account of repatriation of funds was on capital account which could not be construed as part of sale consideration u/s 45. Since as per Rule 115, the gain arising from redemption shares in Euro is Nil, there would not be any income chargeable to tax capital gain tax u/s 45 of ITA.

It is interesting to note if the shares are held as stock in trade or for the purpose of business, the resultant exchange gain would be taxable as business income u/s.43AA of the Act and the ratio of the above decision may not be applicable.

Prior to introduction of section 43AA, exchange loss on restatement of foreign currency loan shall be adjusted to the cost of a capital asset

Aesseal India Pvt. Ltd. v. ITO, ITA 2202 & 2203 of 2017, ITAT Pune

The Taxpayer is wholly owned subsidiary of AES Engineering Ltd, UK. It had availed ECB from its holding company for acquisition of domestic assets and setting up plant in India. At the end of the year, the Taxpayer restated the closing balance of ECB and recognized loss on account of fluctuation in Profit and Loss statement and claimed deduction in ITR. The claim of the Taxpayer was disallowed in assessment.

During the Appellate proceeding, the Taxpayer has withdrawn its primary claim of deduction and made alternate claim that the loss on restatement of ECB is attributable to acquisition

Case Laws

of capital asset within India and accordingly the exchange loss arising on restatement of liability is to be capitalized to the cost of asset. As per the Tax authorities the claim of deduction of foreign exchange cannot be allowed as revenue nor it could be allowed to be adjusted towards the cost of the asset since section 43A is not applicable to it. The loss on account of restatement of ECB was a notional loss.

The only issue which was argued before the ITAT was whether the loss on restatement of ECB can be added to the cost of asset. The ITAT held that the loss on account of foreign fluctuations was not notional as held by the lower Tax authorities. It was also held that that necessary adjustment needs to be allowed to the cost of asset.

It is important to note that section 43AA has been inserted and applicable with effect from April 1, 2017 specifically dealing with tax treatment of foreign exchange fluctuation. As per this section any exchange fluctuational rising on account of change in foreign exchange rates shall be chargeable to tax in case of gain or allowable as deduction in case of loss.

Important Judgements - India

Fees for technical services held taxable on receipt basis instead of accrual basis under Indo-German Tax Treaty

ABB AG, IT(IT)A No.1444/Bang/2019, Bangalore ITAT

In the present case, the taxpayer, ABB AG, a tax resident of Germany was to receive testing and inspection charges from the Indian entity, M/s. ABB India Limited. During AY 2014-15, the Indian entity had only created provision for payment of testing and inspection charges which was invoiced and received by the German taxpayer in subsequent year, AY 2015-16. Another important fact here was that the taxpayer followed cash system and not mercantile system of accounting as reflected in his return of income.

Bangalore ITAT upheld that the fees for technical services were liable to tax in the hands of the German taxpayer only in the year of receipt and not in the year of accrual (AY 2014-15) in light of provisions of Double Taxation Avoidance Agreement (DTAA) between India and Germany. Here it is relevant to note that Article 12 of the Indo-German DTAA defines fees for technical services as "**payments** of any amount in consideration for the services of managerial, technical or consultancy nature ,.." Further, Article 12(6) of the DTAA also mentions that fees for technical services shall be deemed to arise in a Contracting State when the **payer** is a resident of that State. Taking into consideration literal interpretation of the language of the DTAA and relying on judicial decisions in the cases of UHDE GMBH (1996) 54 TTJ 355 (Bom.), Siemens Aktiengesellschaft (ITA No.124 of 2010 dated 22.10.2012) (Bom.) and Johnson & Johnson (2013) 32 taxmann.com 102 (Mum Trib), the ITAT upheld the view that fees for technical services arising to the German taxpayer could be taxed in India only on receipt basis.

This is an important decision on determination of year of taxability of income arising to a non-resident in light of provisions of tax treaty. The Tribunal has however merely relied on and considered past judicial precedents but has not discussed on principles arising out of tax treaties and interplay of provisions of Act and DTAA in detail.

In a similar decision, in the case of Saira Asia Interiors Pvt. Ltd. [ITA No.673/Ahd/2014], which was successfully argued by our senior partner, Mr. Milin Mehta, the Ahmedabad ITAT had ruled that withholding tax provisions u/s 195 read with DTAA between India and Italy would also be attracted on actual payment of royalty and not on mere book entry.

Further, SLP filed by the tax authorities against the ruling of Bombay High Court in the case of Siemens Aktiengesellschaft (ITA No. 124 of 2010) which upheld cash basis for taxing royalty and FTS under Indo-German Tax Treaty has been admitted by the Supreme Court and the matter is pending adjudication at the apex court.

Legal fees to foreign law firms when not covered by Article on Independent Personal Services taxable as Fees for Technical services and not Business income

Shri Hariharan Subramaniam, ITA. No. 7418/Del/2019, Delhi ITAT

The Assessee had made payments to foreign attorneys for registration of patents in various foreign jurisdictions, which were disallowed by assessing officer due to non-deduction of tax at source under Section 195 of the Act.

The assessee's plea that the term FTS and 'Fees for professional services' as used in Section 194J of the Act are distinct and legal fees to foreign attorneys was not in the nature of FTS but was in the nature of business income was rejected by the ITAT. The ITAT was of the view that payments made to the foreign law firms towards legal services involving special knowledge and experience of the relevant laws of the respective countries partake the nature of consultancy and were therefore, were to be regarded as FTS. Accordingly, in cases where provisions of Article on Independent Personal Services were absent in the treaty or were inapplicable, the ITAT ruled that the assessee was liable to withhold tax on payments to foreign attorneys as per article on FTS under relevant tax treaties. It is worth noting that Mumbai Bench of ITAT in the case of ***Deloitte Haskins & Sells*** [ITA No. 5096/Mum/2011] has held that "professional fees" should not be reckoned as fees for rendering of technical services in terms of section 9(1)(vii). However, the Taxpayer has not relied upon this judgment in the case under consideration.

No TDS on reimbursement of salary expenses of foreign employees working abroad apportioned to Indian Project Office

Ecorys Nederlands B. V., ITA No. 6494/Del/2016, Delhi ITAT

Reimbursement of salary expenses apportioned and allocated by Head Office of Netherlands resident company to Indian project office without deduction of tax deductible at source (TDS) was held allowable by the ITAT. The ITAT held that the salary costs reimbursed to foreign company in respect of salaries paid to 10 employees by HO of the foreign company outside India was not taxable in India under Section 5 read with Section 9(1)(ii) of the Act, since the non-resident employees exercised employment outside India, earned as well as received salary income outside India. Similarly, professional fees paid to non-resident consultants were also held non-taxable in light of Article 14 on Independent personal services under India-Netherlands DTAA. Accordingly, disallowances made by Assessing officer/s 40(a)(i) in respect of professional fees and Section 40(a)(iii) in respect of salary cost reimbursement to HO were deleted by the ITAT.

It is interesting to note that the ITAT has looked at the overall nature and purpose of payments made by the project office to the HO and held the same to be non-taxable without dissecting the payments employee-wise considering the fact that 3 out of 10 employees had visited India 95, 27 and 16 days, respectively, whose income could have partly become chargeable to tax in India had the project office employed these personnel and made remittances to them directly. Reliance has been placed by the ITAT on the ruling of Delhi HC in the case of Mother Dairy Fruit, Vegetables (P) Ltd. (ITA No. 980/2009). The facts of the Delhi HC ruling appear to be slightly different as in that case the personnel had not visited India at all, however the said differentiating factor has not been considered by the ITAT in the present case.

Important Judgements - India

Rate of Dividend Distribution Tax to be restricted in light of DTAAs with UK and Spain

Reckitt Benckiser (India) Private Limited, ITA No.518/Kol/2016, Kolkata ITAT

The ITAT allowed additional ground raised by the assessee claiming refund of dividend distribution tax paid in excess of rates of taxes mentioned in the relevant tax treaties on payment of dividends to the shareholders Reckitt Benckiser Pic., UK and Lancaster Square Holdings, Spain.

Last month Delhi ITAT had pronounced landmark decision in favour of the assessee on the same issue in the case of Giesecke & Devrient [India] Pvt Ltd. These decisions are welcome and would be extremely relevant for taxpayers who have declared, distributed or paid dividends prior to April 1, 2020 and have tax returns yet to be filed / revised or have matters pending before appellate authorities wherein the aspect of refund of DDT could be now raised as additional ground.

ITAT upholds royalty taxation for software purchase payments

M/s Kaseya Software India Private Limited, ITA No. 1304/Bang/2018, Bangalore ITAT

Kaseya International Limited (KIL or foreign entity) was licensed owner of certain IT monitoring software products such as 'Kaseya VSA'. Kaseya Software India Private Limited (KSIPL or assessee), a wholly owned subsidiary of KIL, was authorized to sell these software products within the geographical territory of India for which the assessee was to retain a margin of 15% on cost and remit the balance amount of sales proceeds to KIL. KIL had also agreed to reimburse costs incurred by the Indian entity for marketing and selling the software products of KIL in India.

Assessee therefore plead that it was merely a distributor / an intermediary having no rights over the software and that the payments to foreign entity were towards sales price recovered on sale of software net of margin for acting as an intermediary or distributor. Assessee's plea was however rejected by the ITAT and payments made by the assessee to the foreign entity were held to be as payments for purchase of software, taxable as royalty. Disallowance of software purchase payments made without deduction of tax at source under Section 195 at rates applicable to payment of royalty to non-resident was thus upheld by the ITAT.

It is an important ruling on substance over form wherein the nature of transaction was held to prevail over the arrangement between the assessee and the foreign entity and payment terms agreed between the parties. The Court held that in substance, the transaction was of purchase and sale of software and that merely because payment terms was determined as sales price *minus* margin, it did not make the purchase transaction a service transaction. Another important thing to note here is that the case does not discuss any tax treaty implications, if any, as the payments in this case were made to an entity situated in Jersey with which India does not have a comprehensive DTAA in place.

Important Updates - Global

Coverage

India-Japan win OECD's MAP co-operation award for Transfer pricing cases

Mutual Agreement Procedure 2019 Statistics and 2019 Awards were recently released by the OECD. The Awards were declared in four categories by the OECD for both transfer pricing and non-transfer pricing cases, respectively – Category 1 - Average time to close MAP cases; Category 2 - Age of Inventory; Category 3 - Caseload Management; and Category 4 - Co-operation. Based on transfer pricing cases received for resolution on or after January 1, 2016, India and Japan received award for co-operation and highest agreement ratio as a pair of jurisdictions with 64% cases being resolved until end of 2019.

India-Japanese business relationships have flourished in recent years. India received around USD 2.7 billion and USD 2.3 billion of foreign direct investments from Japan during FY 2018-19 and FY 2019-20, respectively. With fostering relationships and global partnership, more and more Japanese MNEs are investing in India. With increasing volumes of investments and intra-group transactions, Japanese MNEs have been keen on opting for MAPs. The ratio of resolutions under MAP between the two countries is quite encouraging. It is also interesting to note that on an overall basis, Indian authorities entered into MAP agreements for 115 transfer pricing cases and 6 other cases during the year 2019.

Economic Substance Regulations (ESR) filing requirements effective in UAE, with initial deadline of December 31, 2020

The UAE had introduced the Economic Substance Regulations (ESR) in April 2019 to which significant changes were made vide Cabinet resolutions and Ministerial Decisions in August 2020. In light of these regulations, UAE Corporates and partnerships with relevant activities are required to furnish Notification and Reports for reportable periods beginning on or after January 1, 2019.

On November 3, 2020, the UAE Ministry of Finance (MoF) has published number of documents in relation to the ESR, including updated templates and guidance for Notifications and Reports to be filed under the new regulations and have clarified that the Notification and Substance Report must be filed electronically through the MoF's Portal that is scheduled to go live in the first week of December 2020 and not later than December 31, 2020. The MoF has issued notice confirming that UAE Licensees i.e. UAE Corporates and partnerships that undertake a Relevant Activity as well as exempted Licensees are required to re-submit a Notification through the MoF's Portal (regardless if it has been submitted to the Regulatory Authority previously). Relevant business activities include variety of financial and service sector activities such as banking, insurance, Investment fund management, headquarter business, Holding company business, Distribution and Services Centre business, Intellectual property business, lease financing and shipping activities.

The templates provide more clarity on the information required to be filed under the ESR. The Notifications which are to be furnished within 6 months from the end of financial year require the entities to provide initial information of the entities and their business activities in UAE along with details of parent company, ultimate parent, ultimate beneficial owners, etc. Further, Economic Substance

Important Updates - Global

Reports that are required to be filed within 12 months from the end of financial year by the specified entities, need reporting of information relating to the entities' revenues, operating expenses, profits, assets, employees and governance related to their Relevant Activities in UAE, details of outsourcing activities, details of board meetings, etc.

ESR are major initiative towards transparency and curbing harmful tax practices by MNE groups, issued by UAE Ministry pursuant to the global standard set by the Organisation for Economic Cooperation and Development ("OECD") Forum on Harmful Tax Practices and the European Union Code of Conduct Group ("EU COCG"),

Oman proposes to be the first Gulf country to introduce personal income taxes

Oman proposes to levy income tax on high income earning individuals, as one of the measures to reduce fiscal deficit, as reflected in Medium Term Fiscal Plan 2020-2024 by Ministry of Finance. Sharp fall in oil prices since 2014 has led to sharp increase in the fiscal deficits says the Ministry which is trying to reduce the deficit by various measure including non-oil revenues, reducing expenditure of civil ministry, reduction in investment budgets and subsidy reforms. Oman has also already introduced VAT vide its Royal Decree No. 121 / 2000 dated October 12, 2020. With exemption for healthcare, education, residential rents and various basic goods, VAT is proposed to be imposed 180 days from date of publication of the Royal Decree.

UK draft tax proposals include hybrid mismatch fixes, R&D tax credit caps

UK Government released public consultation papers on its proposals to be announced vide Finance Bill 2021. The proposals include introduction of rules to deal with hybrid mismatches and measures to limit R&D tax credits. Most changes relating to hybrid mismatch rules are proposed to have retrospective effect from January 1, 2017 while new proposals on hybrid mismatch rules to have effect from Royal Assent of the Finance Bill 2021.

It is also proposed to cap annual deductions and R&D tax credits which a small and medium-sized entity can claim to £20,000 plus 300% of its total relevant expenditure on workers being Pay as you Earn (PAYE) and National Insurance Contributions liability for the period. A company would be exempt from the cap if its employees create, are preparing to create, or manage intellectual property and less than 15% of its R&D qualifying expenditure is spent on sub-contracting to connected persons or externally provided workers by connected persons. This measure will have effect for accounting periods beginning on or after 1 April 2021. These measures are anti-abuse provisions to curb base erosion and profit shifting by MNEs.

Important Rulings - Global

Canadian Tax Court: Mere series of transactions, not involving defeat, misuse or abuse of tax provisions, not to entice Canadian GAAR

Rogers Enterprises (2015) Inc., (Docket: 2017-1140(IT)G and 2017-3617(IT)G), Canada Tax Court

In the present case, Mr. Edward Samuel (Ted) Rogers was the President and CEO of Rogers Communications Inc. ("RCI"), a Canadian public corporation. Mr. Rogers was insured under twelve life insurance policies held by various entities of the RPC group in which Rogers family had controlling interest. All the 12 policies were exempt policies and life insurance proceeds were exempt from Canadian tax.

Initially, policyholders being several entities of the group were the owners of the policy, paid premiums thereunder and were beneficiaries thereto. Pursuant to a group restructuring in 2005, one entity, ESRL, became policyholder for 10 out of 12 policies whereas beneficiary was another entity CGESR. Upon demise of Mr. Rogers in 2008, CGESR received insurance proceeds of CAD 102 million into its capital dividend account (CDA), from which it paid tax free capital dividends to its parent ESRIL 98 which in turn utilized the same to pay tax free capital dividends to ESRL. The above scheme involving the separation of the policyholder and beneficiary, receipt of insurance proceeds into the beneficiary's CDA and subsequent tax free capital dividend payments were considered by tax authorities as a tax-abuse device, thus holding that the capital dividends paid were taxable dividends.

Canadian capital dividend is a type of payment a company makes to its shareholders from paid-in capital, and not from the company's retained earnings as in the case of regular dividends. When capital dividends are paid out to shareholders, these are not taxable because the dividends are viewed as a return of the capital invested. On the other hand, under section 112 of Canadian Income-tax Act, taxable dividends (which are not exempt) received from taxable Canadian corporations are deductible from the taxable income of the recipient corporations.

The Court observed that dividends if not distributed out of capital dividends account would have been included in shareholder's income but coupled with deduction from taxable income, resulting in no additional tax thereon. The Tax Court held that in order to involve provisions of GAAR under Section 245 of the Canadian Tax Court, there should be (i) abuse or misuse of provisions of law such that the transaction defeats or circumvents the spirit or purpose of the relevant law and (ii) such misuse or abuse should result in a tax benefit. Considering that the series of transactions referred to by the tax authorities did not result in any tax benefit to the shareholders, the Court ruled in favour of assessee rejecting application of GAAR provisions.

It is quite interesting to note that to apply the Canadian GAAR provisions what is required is not just tax avoidance but abusive tax avoidance or avoidance coupled with frustrating of taxing provisions. Whereas, in India, GAAR provisions can be involved even if transaction lacks commercial substance and there is no abuse of provisions as misuse or abuse of tax law is one of the conditions for considering an arrangement as impermissible avoidance

Important Rulings - Global

arrangement subject to Indian GAAR. Another differentiating point is that in Canada, onus is on the tax authorities to prove that there is an abusive tax avoidance arrangement entered into by the taxpayers to involve GAAR. On the other hand, in India if an arrangement is deemed impermissible avoidance agreement by the revenue authorities, the onus is on the tax payer to disprove the same.

Irish High Court: Cites principles for determination of nature of income from disposal of IPs (capital / revenue)

Perrigo Pharma International Designated Activity Company, [2020] IEHC 552, The High Court of Ireland

The assessee had sold its interest in intellectual property rights relating to a pharmaceutical product in 2013 and claimed the same to be a trade transaction, which was proposed to be recharacterized by tax authorities as a capital transaction. In the present case, trading transactions from certain trading activities in specified areas were liable to tax at a rate of 12.5% under Section 21 of Taxes Consolidation Act, 1997, whereas, capital transactions involving disposal of IP attracted taxes at an effective tax rate of 33% under Section 78 of the Act.

The moot question before the Court was whether trading of IPs can be considered as trading activity eligible for reduced rate of taxation and whether licensing of the IPs can be considered as trading for the said purpose. The Court held that where the assessee was engaged in the business of licensing of IPs, the licensing income was considered as trading income as reflected in audits for past years as well. However, the Court upheld tax authorities view that when the taxpayer is engaged in the business of licensing of IPs, the IPs take character of capital asset and not stock in trade and thus sale of the IP was a capital transaction and not a trading income as in the case of royalty. Where the taxpayer held multiple IPs, the Court held that while the taxpayer is in trading business, some IPs could still be held as investments and income arising from therefrom could be held capital in nature. The Court looked at various factors, including frequency of transactions, whether or not the asset is used for exploitation and generation of income (such as licensing), etc. to determine whether the IP could be classified as stock in trade or capital asset. In Indian context, the same principle is applicable. it is important to note that Explanation 2 to section 9(1)(vi) clearly provides that any consideration towards transfer of all or any rights in IPs of a nature which would be income of recipient chargeable under the head "Capital Gains" would not be considered as "royalty".

Important Rulings

'Negotiation services' provided by AE as *not* leading to 'deemed international transaction'

Gujarat Gas Trading Company Ltd., Ahmedabad ITAT

The Taxpayer company is engaged in the business of trading in natural gas. During the year under consideration, the AE, B.G. Energy Holding Ltd. ('BGEH') had negotiated a transaction with Cairn Energy Group ('Cairn') for purchase of natural gas from the Lakshmi field of Cairn, for which another group company, BGIPL had entered into an agreement with Cairn for the said purchase under a long-term supply arrangement of 22 years. However, since the Taxpayer desirous of purchasing the natural gas for its expansion plans, the agreement was assigned to the Taxpayer, towards which it had paid commission to BGEH for investing its time and resources for carrying out the negotiation.

The Assessing Officer considered the said transaction of purchase of gas from Cairn as a 'deemed international transaction' as per Section 92B(2) of the Act.

The CIT(A) has passed its order based around the first limb of Section 92B(2) which provides that if the AE and third party (with whom the Taxpayer has entered into a transaction) has a prior agreement, then the said transaction shall be deemed to be an international transaction. Further, the CIT(A) noted that where a commission was paid for carrying out these functions of negotiation of contract, which benefited the Taxpayer was a period of 22 years, it ensured stability of price and supply. Even in case where the transaction is considered to be deemed international transaction, based on purchase prices of natural gas from other parties by the Taxpayer, the same would be at arm's length price. Additionally, the CIT(A) has noted that contract of purchase of natural gas is between Cairn and several Indian entities including the Taxpayer.

Based on the above, the CIT(A) held that the transaction, in absence of a formal agreement between BGEH and Cairn, was not a deemed international transaction. The ITAT has also confirmed the said view of the CIT(A).

In this case, it may be noted that the CIT(A) has heavily relied upon the first limb of Section 92B(2) i.e. existence of a separate contract between AE and Cairn as well as the fact that the long-term arrangement ensures a stability of supply & price for the Taxpayer. It has also stressed on the arm's length nature of transaction in case where the transaction is considered to be a deemed international transaction. However, the second limb of Section 92B(2) i.e. existence of influence of AE in determining the terms of a relevant transaction has not been examined, nor has any discussion been carried out on the same. However, in case the said provision had been argued by the revenue, notwithstanding the arm's length nature of the transaction, there exists a possibility to consider this transaction as a deemed international transaction.

Important Rulings

Substantial revenue locked in sundry debtors justifies TPO's application of working capital adjustment

Transcend MT Services Pvt Ltd, Delhi ITAT

The Taxpayer company is engaged in the business of medical transcription services. It collects, reviews and transcribes medical data information and provides other related services to its AE. For the year under consideration, the Taxpayer had provided services worth Rs. 33.36 crores, whereas it had a receivable of Rs. 19.67 crores i.e., about 60% of revenue.

During TP assessment, the TPO had rejected the quantitative filters adopted by the Taxpayer as well as the comparable companies selected by the Taxpayer and based on a fresh search process, selected 10 comparable companies. The TPO had also suo-moto made working capital adjustment while determining ALP, which was contested by the Taxpayer under the argument that being a captive service provider, it did not bear any working capital risk.

The DRP held that such contention of the Taxpayer is fundamentally flawed as the recovery of dues and inter-play between receivables and fund inflows would be required for basic sustenance and upkeep even for a captive entity. Further, by observing the 60% receivable from AE, the DRP held that it was apparent that substantial revenue of the Taxpayer is locked in receivables. The Delhi ITAT has confirmed the said order of the DRP.

It is interesting to note that, in case of transfer pricing of captive entities, it is frequently noticed that the captive entities are characterised as low-risk or no-risk bearing entities, despite the financial statements indicating otherwise. High outstanding receivable is one of the foremost such examples, which can lead not only to an adjustment for working capital on comparable margins, but in few cases, the courts have also considered them as deemed loans and made an adjustment for interest. Hence, it would be prudent for captive entities to manage its receivables in such a way that either, a working capital adjustment sustains its receivable balance, or the fund inflows are comparable to a normal business and overdue receivables are kept at minimum.

TP adjustment on fixed-asset purchase impacts depreciation claim adjustment for tax depreciable assets

Roki Minda Co Pvt Ltd, Delhi ITAT

The transaction under consideration is that of purchase of fixed asset by the Taxpayer from its AE and an adjustment thereon on account of not meeting the arm's length test by the DRP.

In the present case, the Taxpayer had purchased a fixed asset from its AE, which had in turn purchased the said assets from a third party and resold the same to the Taxpayer with a mark-up of 8%. The contention in this case was the mark-up of 8%, which was held by the revenue as not being in conformation with functions carried out by the AE.

In addition to various arguments, including a benchmarking exercise relying on the mark-up charged by the AE, the AR of the Taxpayer also argued that the Taxpayer had not claimed any depreciation on such fixed assets and hence, no adjustment could be made even if the transaction is held to not meet the arm's length test.

Important Rulings

Coverage

The ITAT has held that the transaction is covered within the meaning of 'international transaction' as envisaged by Section 92B. Further, whether the difference in arm's length price and transaction price could give rise to addition has been discussed in light of the decision of coordinate bench in case of Honda motorcycle and Scooter India private limited vs. ACIT (56 taxmann.com 237). The ITAT has held that in case of transaction in the capital field, the adjustment on account of difference between declared value and ALP has to be given by means of an adjustment to the depreciation claimed. Accordingly, where no depreciation has been claimed, the cost of asset should be adjusted and the allowance of depreciation for future years on such adjusted value of asset should be reduced proportionately.

In view of the above decision, the difference between ALP and transaction value of fixed asset has to be given impact to for the claim of depreciation throughout the life of the asset. Hence, even if no depreciation has been claimed in the year of purchase owing to it being a CWIP item, the future claim of depreciation shall be reduced based on the ALP determined.

The decision is relevant for the company having huge capital work in progress from AE having TP adjustment on such account. It can be argued that no addition in the assessment year can be made since such assets are not put to use.

Circulars & Notifications

Goods and Service Tax (GST)

GSTN Portal Updates

The facility to file annual return in Form GSTR-9 for F.Y. 2019-20 is available on the GSTN portal for filing for taxpayers whose table 8A computation is ready. The computation of the table 8A of the said return for auto population from returns is under progress for all taxpayers which is likely to be completed soon. The due current due date to file GSTR 9 and 9C for the F.Y. 2019-20 is December 31, 2020.

Effective date for applicability of amendment to Section 39 of the CGST Act, 2017 notified

Notification No. 81/2020 – Central Tax dated on November 10, 2020

Section 39 of the CGST Act, 2017 was amended by the Finance Act, 2019 whereby the due date of filing the return was removed from the Section and powers were granted to the Government to notify the due date. The said amendment has now been notified w.e.f. November 10, 2020.

Amendments to CGST Rules relating to filing of returns notified

Notification No. 82/2020 – Central Tax dated on November 10, 2020

Various amendments have been carried out to Rules 59 to 62 of the CGST Rules, 2017 concerning to the manner of furnishing GST returns. The key amendments are mentioned below:

- Rule 61A inserted prescribing the manner of opting for and filing quarterly returns, and the mechanism to make payment.
- New Invoice Furnishing Facility (IFF) been introduced for filing taxpayers who have opted quarterly returns. Such taxpayers may furnish the details of outward supply for first two months of the quarter between 1st to 13th of the succeeding month.
- Format and provisions of FORM GSTR 2B have been specified.
- GSTR 3B has been notified as a monthly and quarterly return. With effect from January 01, 2021, the due date for filing GSTR 3B has been notified as 20th of succeeding month in case of monthly filers and 22nd or 24th of the succeeding month depending on the state of registration in case of quarterly filers.
- HSN Codes to be mandatorily mentioned in FORM GSTR-1.

Due date for filing GSTR 1 w.e.f. January 2021 notified

Notification No. 83/2020 – Central Tax dated on November 10, 2020

Due date for filing GSTR 1 from January 01, 2021 prescribed as 11th and 13th of the succeeding month for monthly and quarterly return filers, respectively.

Eligibility criteria for filing GSTR 3B on quarterly basis notified

Notification No. 84/2020 – Central Tax dated on November 10, 2020

Taxpayers having an aggregate turnover of up to Rs. 5 crores in preceding financial year, notified as eligible to opt for quarterly return filing. Taxpayers having turnover between 1.5 Cr to 5 Cr shall be deemed to have exercised a monthly

Circulars & Notifications

or quarterly option on the basis of the option currently opted for.

Mechanism for making payment for quarterly return filers

Notification No. 85/2020 – Central Tax dated on November 10, 2020

A taxpayer opting to file quarterly returns shall be required to make payment of tax on a monthly basis by way of depositing the requisite amount in the Electronic Cash Ledger through Pre-filled challan in FORM GST PMT 06 for the following amounts:

- **35% of the tax paid in cash** in the preceding quarter where the return was furnished on a quarterly basis; or
- **The tax paid in cash in the last month** of the immediately preceding quarter where the return was furnished on a monthly basis

In case the amount lying in the electronic cash ledger is sufficient to meet the liability of the month, then no amount shall be required to be deposited. The taxpayer shall be allowed to follow the above procedure only if the return for the preceding tax period has been furnished.

Extended time limit for filing form ITC 04

Notification No. 87/2020 – Central Tax dated on November 10, 2020

Time limit for filing form ITC 04 for the quarter July, 2020 to September, 2020 is extended till November 30, 2020.

Enlarging the applicability of E-invoice

Notification No. 88/2020 – Central Tax dated on November 10, 2020

From January 01, 2021, the provisions of e-invoicing will be applicable to the registered taxpayers having turnover exceeding Rs. 100 crores. Currently the provisions are applicable to only taxpayers having turnover exceeding Rs.500 crores.

Waived off general penalty for non-complying with QR code provisions

Notification No. 89/2020 – Central Tax dated on November 29, 2020

Penalty payable for non-compliance with the provisions of generating QR code is waived off for the period December 01, 2020 to March 31, 2021 subject to the conditions that the taxpayer complies with the provisions from April 01, 2021.

Clarification on provisions relating to Quarterly Return Monthly Payment Scheme

Circular No. 143/13/2020 dated 10 November 2020

The Government has issued a detailed circular explaining the mechanism of filing of return on a quarterly basis and making payment on a monthly basis.

DGFT

New modules available to newly revamped DGFT online environment

Trade Notice No 35/2020-21

DGFT has made available services of Advance Authorisation, EPCG and DFIA from December 01, 2020 on the revamped DGFT online platform.

Suggestions are invited for new FTP

Trade Notice No 34/2020-21

Suggestions are invited from stakeholders for new FTP. Link for google form created for suggestion is https://bit.ly/3khHEI2 .

Case Laws

Construction of the pipeline shall amount to supply of Works Contract Services and liable to GST

M/s Maninder Singh (Under trade name of Mideast Pipeline Products)
Advance Ruling number - 10/WBAAR/2020-21- West Bengal

The GOI and the GOB have entered into an MOU for construction of a pipeline from Siliguri in India to the depot of the BPC in Bangladesh. The work will be monitored by MEA, which has engaged M/s Numaligarh Refinery Ltd ('NRL') as an implementation agency. NRL has awarded the contract for the installation of the said pipeline to the Taxpayer.

Considering that part of the pipeline was to be constructed in Bangladesh, the Taxpayer approached the AAR to seek clarifications on the taxability of the transaction and availability of ITC on the goods and services being following points.

The Taxpayer contended that ultimate recipient of its service is BPC which is located in Bangladesh and NRL is merely an intermediatory working on behalf of MEA. Therefore, POS shall be outside India & the supply made by the Taxpayer shall fall under the category of Export of Services. The Taxpayer also submitted that NRL receives the land from BPC for construction of the pipeline. On such grounds, the Taxpayer contended that the entire strip of land from Indian border to the depot in Bangladesh should, be considered as the "location for the recipient of services" in terms of 2(14)(c) of the IGST Act which refers to a place of business or a fixed establishment which is most directly concerned with the supply and location of the establishment and therefore, the services should be treated as export of services.

The AAR observed that since NRL has awarded the contract to the Taxpayer and NRL also pays the consideration, NRL shall be considered as the recipient of the services of the Taxpayer. The AAR also observed that a strip of land extending over more than a hundred kilometre is not a fixed establishment in terms of section 2(7) of the IGST Act. Accordingly, NRL being registered in India, the AAR, concluded that the POS in the present case shall be determined in terms of proviso to section 12(3)(a) of the IGST Act since the services relate to construction of an immovable property. The place of supply shall be therefore, the location of the recipient i.e., in India.

While the AAR did not go into the reasoning as to why the land on which the pipeline is to be constructed can be considered as a fixed establishment of the recipient, the observation that such strip of land cannot be considered as a fixed establishment is important. Under the GST law a fixed establishment is a place having sufficient degree of permanence and suitable structure in terms of human and technical resources to supply services or receive services for own needs and a piece of land does not fall within such definition, seems to be the interpretation of the AAR.

Case Laws

Coverage

ITC is not available on Healthcare services provided by hospital which are exempted under GST. Food supplied to inpatients shall be treated as a part of composite supply of healthcare services.

M/s Ambara, Advance Ruling number – KAR ADRG 51/ 2020- Karnataka

The Taxpayer is a hospital and is engaged in the business of providing health care such as diagnostic and treatment services. The Taxpayer approached the AAR to seek clarifications in respect of taxability of services provided and the availability of ITC on the goods and services procured by it:

- Whether ITC is required to be restricted on medicines supplied to in-patients and out-patients?
- Whether ITC is required to be restricted on medicines supplied to persons other than inpatients and outpatients?
- Whether ITC is required to be restricted on supply of food and beverages to the patients admitted in hospital?

The AAR concurred with the view of the Taxpayer that healthcare services provided by them to the inpatients shall be treated as exempted services since the hospital shall be treated as a clinical establishment. The AAR also agreed to the submission of the Taxpayer that medicines supplied to inpatients during provision of health care services are also exempt even though the Taxpayer bills the medicines separately, considering the supply of healthcare services and medicines as composite supply where the healthcare service being the principal supply is exempted. Accordingly, the ITC on medicines supplied to inpatients in the course of providing healthcare services shall not be available.

With respect to the services provided to outpatients, where certain medicines or consumables are consumed in the provision of health care services, the output is only healthcare services to the outpatients which is exempted. Accordingly, ITC of such medicines / consumables shall not be allowed. However, when medicines are sold separately to the outpatients from the pharmacy, such sale would be liable to GST and accordingly, the ITC of on such medicines shall be allowable. Similarly, when medicines are sold to customers who are not inpatients of outpatients, GST shall be applicable and ITC on the purchase of the medicines shall be allowed.

With respect to the supply of food and beverages to the inpatients, the AAR observed that when the food and beverages are supplied to the inpatients as part of the treatment then such supply shall be treated as ancillary to the supply of health care service, and hence, exempted. The AAR further made an observation that in case the food and beverages are not supplied as a treatment but on the request of the patient, the taxability of the same shall have to be analysed. However, based on the confirmation of the Taxpayer that the patients are not allowed to consume outside food and are compulsorily required to eat the hospital food, the AAR held that such supply of food and beverages shall be considered as naturally bundled with the supply of healthcare services and accordingly exempted. Therefore, the ITC of such food and beverages purchased by the Hospital shall not be allowed.

Case Laws

The present AAR seems to be in the right direction and provides clarity on the various supplies made by the hospitals to inpatients, outpatients and other customers.

Accumulated ITC can be transferred through filing of ITC-02 in the event of transfer of the business as a going concern.

M/s Shilpa Medicare Limited, Advance Ruling number – 05/AP/ GST 2020- Andhra Pradesh

The Taxpayer undertakes R& D work in API & formulation molecules & manufacture of formulation products. The Taxpayer is shifting R&D unit located in A.P (Registered in GST) to its another unit located in Karnataka (Registered in GST). The Taxpayer is having accumulated balance of ITC in their ECL.

The Taxpayer approached AAR to seek clarification on the following,

- Whether the transaction of transferring R&D unit would amount of supply of goods or services?
- Whether it would cover under Sr. No. 2 of Notification No. 12/2017-C.T.(Rate)?
- Whether ITC-02 return can be filed to transfer unutilized ITC?

The AAR observed that the Taxpayer is transferring the whole business of the unit in Andhra Pradesh as a going concern along with capital assets for a monetary consideration to another unit in Karnataka. The definition of supply is inclusive in nature and it is wider to cover such transfer and hence the transaction shall qualify as supply. Such transfer, being in the nature of transfer as a going concern, would be covered under the exclusion provided entry 4(c) of the Schedule II of CGST Act, 2017 and would, therefore, amount to supply of services. Transfer of a business as a going concern is covered under Sr. No. 2 of Notification No. 12/2017-C.T. (Rate) and liable to tax at nil rate.

The AAR also held that the Taxpayer can file ITC-02 and transfer the accumulated ITC in the view of section 18(2) of CGST Act, 2017 read with rule 41 of CGST Rules, 2017 which provides that the registered person shall be allowed to transfer the accumulated ITC where there is a change in the constitution on account of sale, merger etc. with specific provision for transfer of liabilities.

The present AAR is important for the companies that seek to consolidate their operations and wish to close down their units but have accumulated ITC lying. The AAR has given an important finding that the ITC of one unit in one state can be transferred to another unit in another state if the transferring unit is closed and transferred as a going concern

Foreign Award of Arbitration whose seat is abroad cannot be challenged under Section 34 of Arbitration and Conciliation Act in India-Apex Court

NOY VALLESINA ENGINEERING SPA v/s JINDAL DRUGS LIMITED & ORS. [CIVIL APPEAL NO. 8607 OF 2010]

As per the Hon'ble Supreme Court's decision in the aforementioned case, a foreign award of an arbitration whose seat is abroad cannot be challenged under Indian laws since the Indian Courts do not have the jurisdiction to do so. This decision has far reaching implications for Indian Companies accepting / agreeing to foreign locations as seat of arbitration for various contractual agreements.

Chronological Sequence of Events:

The chronological progression of how the events have taken place are enumerated below.

- Noy Vallesina Engineering SpA, Italy ("*Appellant*") and Jindal Drugs Limited ("*Respondent*") entered into a contract for setting up a plant in India in the year 1995. Disputes arose thereafter and the Appellant terminated the agreement and claimed damages.
- The matter was taken to the International Court of Arbitration ("ICA") in the year 1996.
- The Arbitration Tribunal on February 1, 2000, ordered partial award against the Respondent.
- The Respondent therefore filed a petition before the Hon'ble Bombay High Court ("BHC") against the said award.
- Whilst the order for the petition with BHC was pending, ICA passed its final award on October 22, 2001.
- On February 6, 2002, the petition filed by the Respondent before BHC against the order passed by the ICA for partial award was dismissed by the single judge bench of BHC stating that a challenge against a foreign award through a petition was not maintainable under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act").
- The Respondent in response to the adverse judgement, appealed against the said order passed of single bench of BHC by approaching the division bench of BHC.
- During the meantime, the Appellant filed a petition for enforcement of the final award dated October 22, 2001 passed by the ICA. The Appellant's petition for enforcement of award was allowed.
- The division bench of BHC set aside the single judge's order and held the matter in the favour of the Respondent, stating that the proceedings under Section 34[1] of the Act, an be validly maintained to challenge a foreign award, as on April 28, 2008.
- In contention to the division bench's order, the Appellant approached the Hon'ble Supreme Court against the said order passed by the division bench of BHC.

[1] Section 34 of The Arbitration and Conciliation Act, 1996 deals with "Application for setting aside arbitral award" by taking recourse of the Court.

- The Hon'ble Supreme Court laid strong reliance on the said BALCO case and accepted the contentions of the Appellant and set aside the order passed by the division bench of BHC and allowed the appeal and upheld the contention that a foreign award of arbitration whose seat is in abroad cannot be challenged under Indian laws.

Arguments / Contentions by the Legal Counsel of the Appellant:

- The Appellant's counsel contended that the judgment passed by the division bench was unsupportable by law as a foreign award cannot be challenged under Section 34 of the Act and made reliance on several case laws. Learned counsel of the Appellant submitted that the conduct of arbitration and any challenge to an arbitral award shall be governed by the law of the country where the arbitration has been conducted and relied on *Bharat Aluminium Company vs Kaiser Aluminium Technical Services Inc.* [2012 (9) SCC 552] ("BALCO") extensively in support of his argument that the foreign awards in this case, having been rendered outside India under the aegis of the ICA cannot be challenged merely because a condition in the underlying contract says that the law governing the agreement, would be Indian law.
- The counsel further argued upon the "*Shashoua principle*" and according to that principle, the designation of a "seat" of the arbitration would carry with it "something akin to an exclusive jurisdiction clause". In *IMAX Corporation v. E-City Entertainment (India) (P.) Ltd.* [2017 (5) SCC 331], the Hon'ble Supreme Court had also followed this rule taking into consideration the fact that the parties had expressly chosen to resolve the dispute through the ICC, in the form of a London based arbitration. The court had stated that "*ICC having chosen London, leaves no doubt that the place of arbitration will attract the law of UK in all matters concerning arbitration.*"
- According to Section 50 of Act[2], the counsel argued that the order holding that the petition under Section 34 was not maintainable, was not appealable.

Order of Hon'ble Supreme Court:

The Hon'ble Supreme Court laid strong reliance on the Bharat Aluminium Company vs Kaiser Aluminium Technical Services Inc. [2012 (9) SCC 552] ("*BALCO*") case and accepted the contentions of the Appellant and set aside the order passed by the division bench of BHC passed on April 28, 2008. The Apex Court allowed the appeal by the Appellant and upheld the contention that a Foreign Award of Arbitration whose seat is in abroad cannot be challenged under Indian laws.

[2] Section 50 of The Arbitration and Conciliation Act, 1996 deals with "Appealable Orders" and lists such orders against which appeals can/ cannot be filed before a court.

Foreign Exchange Management Act, 1999 (FEMA)

Bar on establishment of Branch Office (BO) / Liaison Office (LO) / Project Office (PO) or any other place of business in India by foreign law firms

RBI/2020-21/69, A.P. (DIR Series) Circular No. 07 dated November 23, 2020

Neither the Reserve Bank of India (RBI) nor the AD Category-I Banks shall grant either fresh permissions or renew permissions already granted to any foreign law firms/companies, foreign lawyers or any other person residing outside India for establishing a Liaison Office, Branch Office or Project Office or other place of business in India for practicing the law profession. This decision has been taken in lieu of the disposal of case pending with the Hon'ble Supreme Court. The apex court has stated that only advocates enrolled under the Advocates Act, 1961 are entitled to practice law in India. This decision is akin to certain other professions which have put restrictions or barred professionals/entities from practicing in India unless they have registration under the specified Act, governing such practicing professionals in India.

24x7 Availability of Real Time Gross Settlement (RTGS) System

RBI/2020-21/70, DPSS (CO) RTGS No.750/04.04.016/2020-21 dated December 04, 2020

Reserve Bank of India (RBI) has announced system round the clock on all days' Real Time Gross Settlement (RTGS) facility. The revised timings for RTGS shall come into effect from 00:30 hours on December 14, 2020. The erstwhile RTGS service window for customer transactions was available from 7:00 am to 6:00 pm on a working day. However, these were also bank specific and the timings could vary from bank to bank.

This is a big step from the RBI to make funds availability on tap and in line with the digitalization initiatives being introduced in the Indian Banking system.

Amendments relating to Compounding of Contraventions

RBI/2020-21/67, A.P. (DIR Series) Circular No. 06 November 17, 2020

With the notifying of *Foreign Exchange Management (Non-debt Instruments) Rules, 2019* and the *Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019* on October 17, 2019 by Government of India and the Reserve Bank of India (RBI) respectively, the Foreign Exchange Management (Transfer of Issue of Security by a Person Resident outside India) Regulations, 2017 issued vide Notification No. FEMA 20(R)/2017-RB dated November 7, 2017 stands superseded. However, the Master Direction on Compounding of Contraventions still referred to the superseded Regulations which needed amendments to be brought in line with the extant FEMA Rules and Regulations. This RBI Circular has been issued to introduce the necessary amendments in Compounding of Contraventions provisions to be in line with the extant Rules/Regulations.

The following contraventions under the said Rules and Regulations have been delegated to the Regional Offices/ Sub Offices of the Reserve Bank for Compounding:

FEM (Non-Debt Instruments) Rules, 2019 dated October 17, 2019 ("Rules")

Rules	Nature of Transaction / Contravention
Rule 2(k) read with Rule 5	Issue of ineligible instruments [non-adherence to entry routes, sectoral caps or the investment limits, as the case may be, and the attendant conditionalities]
Rule 21	Violation of Pricing Guidelines for Issue / Transfer of Equity Instruments
Paragraph 3 (b) of Schedule I	Issue of equity instruments without approval of RBI or Government, wherever required [non-adherence to sectoral caps]
Rule 4	Receiving investment in India from Non-Resident or taking on record transfer of equity instruments by Investee Company
Rule 9(4) and Rule 13(3)	Gift of Equity Instruments - without seeking prior approval of the Reserve Bank of India (i) Gift of equity instruments held by a Person Resident in India on a Non-Repatriation Basis to a Person Resident outside India [Rule 9(4)] (ii) Gift of equity instruments by a NRI/OCI/eligible investor under Schedule IV holding equity instruments on a non-repatriation basis to a person resident outside India on Repatriation Basis [Rule 13(3)]

RBI & FEMA Notifications

FEM (Mode of Payment and Reporting of Non-Debt Instruments) Regulations dated October 17, 2019 ("Regulations")

Regulations	Nature of Transaction / Contravention
Regulation 3.1(I)(A) - Foreign Direct Investment in India (Payment and Remittance)	Contraventions with regard to Mode of Payment and Remittance of sale proceeds for Investments made under Schedule I to Schedule X of the Regulations, which include FDI on both repatriable and non-repatriable basis as well as investments made by FVCI, investment in LLP, Investment Vehicles and IDRs.
Regulation 4(1) - Reporting fresh issue of equity instruments	Contravention by an Indian company in reporting issuance of equity instruments to a person resident outside India in Form Foreign Currency-Gross Provisional Return (FC-GPR)
Regulation 4(2) - Reporting of Foreign Assets and Liabilities	Contravention in filing Annual Return on Foreign Liabilities and Assets (FLA) on or before 15th July
Regulation 4(3) - Reporting transfer of equity instruments	Contravention in reporting transfer of equity instruments Form Foreign Currency-Transfer of Shares (FC-TRS)
Regulation 4(6) - Reporting investment in LLP	Contravention in reporting receipt of consideration for capital contribution and acquisition of profit shares in Limited Liability Partnership (LLP) and in Form LLP (I) within 30 days of such receipt
Regulation 4(7) - Reporting divestment in LLP	Contravention in reporting disinvestment / transfer of capital contribution or profit share between a resident and a non-resident (or vice versa) in Limited Liability Partnership (LLP) in Form LLP (II) within 60 days of receipt of funds
Regulation 4(11) - Reporting Downstream Investment	Contravention in notifying to the Secretariat for Industrial Assistance, DPIIT within 30 days of making Downstream investment and reporting of indirect foreign investment by filing Form DI with the Reserve Bank within 30 days from the date of allotment of equity instruments

RBI & FEMA Notifications

During 2010/2012, RBI had issued Circulars classifying contraventions into 3 primary categories, namely '*technical*' or '*material*' or '*sensitive/serious*" in nature. RBI has now decided to discontinue the classification of a contravention under the category '*technical*' that was earlier dealt with through cautionary advice and regularizing the same by imposing nominal penalty.

RBI had started the initiative of displaying the full contents of the Compounding Orders passed by Regional Directors handling the respective compounding applications since 2016. However, RBI has decided not to publicly disclose the full Compounding Orders but to provide certain limited information being name of applicant, details of contraventions in brief, date of compounding order and compounding fees.

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For further analysis and discussion, you may please reach out to us.

Locations

Ahmedabad

Arpit Jain
Level 11, Tower B,
Ratnaakar Nine Square, Vastrapur,
Ahmedabad - 380 015

Phone: + 91 79 4910 2200
arpit.jain@kcmehta.com

Bengaluru

Payal Shah
19/4, Between 7th & 8th Cross,
Malleswaram,
Bengaluru - 560 00

Phone: +91 80 2356 1880
payal.shah@kcmehta.com

Mumbai

Vishal Doshi
508, The Summit Business
Bay, Nr. WEH Metro Station,
Gundavali, Andheri East,
Mumbai - 400069
Phone: +91 22 2612 5834
vishal.doshi@kcmehta.com

Vadodara

Milin Mehta
Meghdhanush,
Race Course,
Vadodara - 390 007

Phone: +91 265 2440400
milin.mehta@kcmehta.com

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Abbreviations

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Abbreviation	Meaning
AAAR	Appellate Authority of Advance Ruling
AAC	Annual Activity Certificate
AD Bank	Authorized Dealer Bank
AE	Associated Enterprise
AGM	Annual General Meeting
AIF	Alternate Investment Fund
AIR	Annual Information Return
ALP	Arm’s length price
AMT	Alternate Minimum Tax
AO	Assessing Officer
AOP	Association of Person
APA	Advance Pricing Arrangements
AS	Accounting Standards
ASBA	Applications Supported by Blocked Amount
AY	Assessment Year
BBT	Buy Back Tax
BOE	Bill of Entry
BOI	Body of Individuals
BT	Business Trust
CBDT	Central Board of Direct Tax
CBIC	Central Board of Indirect Taxes and Customs
CCA	Cost Contribution Arrangements
CCR	Cenvat Credit Rules, 2004

Abbreviation	Meaning
CESTAT	Central Excise and Service Tax Appellate Tribunal
CFC	Controlled Foreign Corporation
CGST	Central Goods and Services Tax
CIT(A)	Commissioner of Income Tax (Appeal)
CPC	Central Processing Centre
COI	Constitution of India
CPSE	Central Public Sector Enterprise
CSR	Corporate Social Responsibility
CTA	Covered Tax Agreement
CUP	Comparable Uncontrolled Price Method
CUP	Cost Plus Method
DDT	Dividend Distribution Tax
DGFT	Directorate General of Foreign Trade
DPIIT	Department of Promotion of Investment and Internal Trade
DRP	Dispute Resolution Panel
DTAA	Double Tax Avoidance Agreement
ECB	External Commercial Borrowing
ECCS	Express Cargo Clearance System
EGM	Extra-ordinary General Meeting
EOU	Export Oriented Unit
FAR	Function Assets and Risk

Abbreviation	Meaning
FEMA	Foreign Exchange Management Act, 1999
FII	Foreign Institutional Investor
FIFP	Foreign Investment Facilitation Portal
FIRMS	Foreign Investment Reporting and Management System
FLAIR	Foreign Liabilities and Assets Information Reporting
FPI	Foreign Portfolio Investor
FOCC	Foreign Owned and Controlled Company
FTC	Foreign Tax Credit
FTP	Foreign Trade Policy
FTS	Fees for Technical Service
FY	Financial Year
GAAR	General Anti-Avoidance Rules
GDR	Global Depository Receipts
GOI	Government of India
GST	Goods and Service Tax
GVAT Act	Gujarat VAT Act, 2006
HC	High Court
HSN	Harmonized System of Nomenclature
ICAI	Institute of Chartered Accountant of India

Abbreviations

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Abbreviation	Meaning
ICDS	Income Computation and Disclosure Standards
ICDR	Issue of Capital and Disclosure Requirements
IDS	Inverted Duty Structure
IGST	Integrated Goods and Services Tax
IRDA	Insurance Regulatory and Development Authority
ISD	Input Service Distributor
ITA	Income Tax Act, 1961
ITC	Input Tax Credit
ITR	Income Tax Return
IT Rules	Income Tax Rules, 1962
ITAT	Income Tax Appellate Tribunal
ITR	Income Tax Return
ITSC	Income Tax Settlement Commission
JV	Joint Venture
LEO	Let Export Order
LIBOR	London Inter Bank Offered Rate
LLP	Limited Liability Partnership
LO	Liaison Office
LODR	Listing Obligations and Disclosure Requirements
LTA	Leave Travel Allowance
LTC	Lower TDS Certificate
LTCG	Long term capital gain

Abbreviation	Meaning
MAT	Minimum Alternate Tax
MCA	Ministry of Corporate Affairs
MFN	Most Favored Nation clause under DTAA
MSF	Marginal Standing Facility
MSME	Micro, Small and Medium Enterprises
ODI	Overseas Direct Investment
OECD	The Organization for Economic Co-operation and Development
OM	Other Methods prescribed by CBDT
PAN	Permanent Account Number
PE	Permanent establishment
PPT	Principle Purpose Test
PSM	Profit Split Method
PY	Previous Year
RBI	Reserve Bank of India
RCM	Reverse Charge Mechanism
RMS	Risk Management System
ROR	Resident Ordinary Resident
ROSCTL	Rebate of State & Central Taxes and Levies
RoDTEP	Remission of Duties and Taxes on Exported Products
RPM	Resale Price Method
SC	Supreme Court of India

Abbreviation	Meaning
SDT	Specified Domestic Transaction
SDS	Step Down Subsidiary
SE	Secondary adjustments
SEBI	Securities Exchange Board of India
SEP	Significant economic presence
SEZ	Special Economic Zone
SFT	Specified Financial statement
SION	Standard Input Output Norms
SST	Security Transaction Tax
ST	Securitization Trust
STCG	Short term capital gain
STPI	Software Technology Parks of India
TCS	Tax collected at source
TDS	Tax Deducted at Source
TNMM	Transaction Net Margin Method
TP	Transfer pricing
TPO	Transfer Pricing Officer
TPR	Transfer Pricing Report
TRO	Tax Recovery Officer
WHT	Withholding Tax
WOS	Wholly Owned Subsidiary